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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81 6174

RAYMOND FRANKLIN,

Petitioner,

VS.

WALTER ZANT, Superintendent,

Georgia Diagnostic and Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE SUPERIOR COURT OF BUTTS COUNTY

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QUESTIONS PRESENTED

1.

Whether Petitioner's conviction and death sentence were imposed in an arbitrary and capricious manner in violation of the Fourteenth Amendment to the United States Constitution due to the trial court's instructing the jury that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.

2.

Whether Georgia Code Ann. §38-801(d), requiring the tender of attendance and mileage fees with a witness subpoena, denied Petitioner, an indigent death row inmate in a state habeas corpus proceedings, equal protection of the meaningful access to the court and compulsory process to compel the attendance of witnesses his behalf as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

3.

Whether Franklin's death sentence was imposed by a jury without complete information concerning Petitioner's life and circumstances thus violating Petitioner's rights and upon improperly admitted aggravating circumstances thus violating Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution and failing to comport with the constitutional requirement of individualized sentencing in capital cases.

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1. Petitioner' conviction and death sentence were imposed in an arbitrary and capricious manner in violation of the Fourteenth Amendment to the United States Constitution due to the trial court's instructing the jury that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. 1

2. Georgia Code Annotated §38-801 (d), requiring the tender of attendance and mileage fees with a witness subpoena, denied Petitioner, and indigent death row inmate in a state habeas corpus proceeding, equal protection of the meaningful access to the court and compulsory process to compel the attendance of witnesses in his behalf as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. 5

3. Franklin's death sentence was imposed by a jury without complete information concerning Petitioner's life and circumstances, thus violating Petitioner's rights and upon improperly admitted aggravating circumstances, thus violating Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution and failing to comport with the constitutional requirements of individualized sentencing in capital cases. 8

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IN THE

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OCTOBER TERM, 1981

No. 81-

RAYMOND FRANKLIN,

Petitioner

VS.

WALTER ZANT, Superintendent,

Georgia Diagnostic and Classification

Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF BUTTS COUNTY

Petitioner prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia entered on September 10, 1981. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia November 5, 1981.

CITATIONS TO OPINION BELOW

Application for certificate of probable cause to appeal was denied by the Georgia Supreme Court November 5, 1981. The order of the Georgia Supreme Court and the unreported opinion of the Superior Court of Butts County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of the court is invoked under 28 U.S.C. §1257(3), Petitioner having asseted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Butts County was sought in the Supreme Court of Georgia pursuant to Ga. Code

Ann. §24-4526. Review was denied November 5, 1981. Pursuant to Rule 20 of the Rules of the Supreme Court the time for this petition runs from the denial of review issued by the Georgia Supreme Court November 5, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C hereto:

Georgia Code Ann. §26-1101

Georgia Code Ann. §38-801(d)

Georgia Code Ann. §50-127

Georgia Code Ann. §24-4526

HOW THE ISSUES WERE RAISED BELOW

In his State habeas corpus petition, Petitioner raised each of the constitutional issues previously listed in the section titled "Questions Presented".

STATEMENT OF THE CASE

On April 26, 1979, Petitioner was convicted of murder and sentenced to death in the Superior Court of Bibb County, Georgia. The judgment and sentence was affirmed by the Georgia Supreme Court in Franklin v. State,

245 Ga. 141 (1980).

Certiorari was denied by this Court in Franklin v. Georgia, _____ U.S. _____(1980).

On March 31, 1981, a petition for writ of habeas corpus was filed in the Superior Court of Butts County, Georgia.

The Court denied habeas corpus relief on September 10, 1981 in an unreported decision. On November 1, 1981, the Georgia Supreme Court denied a timely application for certificate of probable cause to appeal.

REASONS FOR GRANTING THE WRIT

1. PETITIONER'S CONVICTION AND DEATH SENTENCE WERE IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DUE TO THE TRIAL COURT'S INSTRUCTING THE JURY THAT A PERSON OF SOUND MIND AND DISCRETION IS PRESUMED TO TO INTEND THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTS.

Conclusive presumptions "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime", Morissette v. U.S., 342 US 246 and 247, 96 L Ed 288, 72 SCt 240. The Fourteenth Amendment to the United States Constitution mandates that the State prove each and every element of a criminal offense beyond a reasonable doubt. The Court has very clearly enunciated that intent is one of the elements which the government must prove.

The presumption announced to petitioner's jury may well have had the consequences of "overriding the presumption of innocence," Morissette,supra; as well as "invad(ing the) factfinding function United States v. United States Gypsum Co.,438 US 422, at 446, 57 L Ed 2d 854, 98 SCt 2864, which in a criminal case the law assigns to the jury. Further, in the Court in Sandstrom v. Montana, 442 US 510, 61 L Ed 2d 39, 99 SCt 2450, held that "the effect of a presumption in a jury instruction is determined by the way in which a reasonable juror could have interpreted it", and that "numerous courts' have differed as to the effect of the presumption when given as a jury instruction without further explanation as to its use by the jury' and that some (courts) have found it to shift

more than the burden of production, and even to have conclusive effect."

An instruction to the jury such as "the law presumes that a person intends the ordinary consequences of his voluntary acts" can be interpreted in many ways. Such an instruction does more than merely affect only the burden of going forward with evidence of intent. "A reasonable jury could well have interpreted the presumption as 'conclusive', that is, not technically as a presumption at all, but rather as an irrebuttable direction by the Court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the Defendant's voluntary actions (and their 'ordinary' consequences) unless the Defendant proved the contrary by some quantum of proof . . . thus effectively shifting the burden of persuasion on the element of intent." Sandstrom, supra, at 517. See generally U.S. v. Wharton 193 US App DC 293, 433 F 2d 451 (1970); Berkonite v. U.S., 213 F2d 468 (CAS 1954).

Since a charge such as this " . . . shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of intent", Sandstrom, supra, at 518; Mullaney v. Wilbur, 421 US 684, 703, 44 LEd 2d 508, 95 SG 1881 (1975), then the jury instruction which was given at petitioner's trial violated the Constitution of the State of Georgia, as well as the Constitution of the United States, because it relieves the government from the burden of proving one of the elements of the crime, that is, intent.

Regardless of whether the effect of the instruction is to raise a conclusive presumption in the jury's minds on the issue of intent, or whether they perceive the instruction to have the effect of shifting the burden to the Defendant to establish the absence of intent, the result of such an instruction would be to "conflict with the overriding presumption

of innocence with which the law endows the accused and which extends to every element of the crime" Morissette, supra, at 2785; and thus violates the Constitution of the United States.

"A Defendant's state of mind or intent is an element of a criminal . . . offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent," Morissette, supra, at 276. "Ultimately the decision on the issue of intent must be left to the trier of the fact alone. The instruction given invaded this fact finding function, "United States vs. U. S. Gypsum Co., supra, at 435.

"It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." Morissette, supra, at 274-275; as well as "invad(ing the) factfinding function" United States v. U. S. Gypsum Co., supra at 446; which is the exclusive province of the jury.

The instructions announced to the Raymond Franklin jury may well have had exactly these consequences. In the instant case, the trial court instructed the jury that:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will . . . (a) person of sound mind and discretion is presumed to intend the natural and probable consequence of his acts."

Further, it is evident from the facts of the instant case, as

well as from the charge to the jury and the jury's subsequent inquiries of the court, that the issue of "intent" or "accident" was paramount. Additionally, as petitioner's sole defense was that of accident, i. e. lack of intent, failure to instruct the jury properly, on this issue, was fatal to petitioner's defense. See Appendix "D". Note page 12 and 13.

"Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (element . . . the) jurors could reasonably have concluded that they were directed to find against the Defendant on the element of intent. The State was thus not forced to prove beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged', In re Winship, 397 US 358, at 364, 25 L Ed 2d 368, 90 SCt 1058, 51 Ohio Ops 2d 323 (1970); and Defendant was thus deprived of his constitutional rights as explicated in Winship" Sandstrom, supra, at 523.

"A presumption which, although not conclusive had the effect of shifting the burden of persuasion to the Defendant, would have suffered from similar infirmities. If (the) jury interpreted the presumption in that manner, it could have concluded that upon proof by the State of the staying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the Defendant to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in Mullaney v. Wilbur, supra" Sandstrom, supra at 524.

"Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption, like that in Mullaney, or a conclusive presumption like those in Morissette and United States v. United States Gypsum Co., and because either interpretation would have deprived Defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional". Sandstrom, supra at 524.

Further, as the jury's verdict was a general one, we have no way of knowing that the Defendant was not convicted on the basis of the unconstitutional charge. "And 'it has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionally of any of the theories requires that the conviction be set aside. See, e. g., Stromberg v. California, 283 US 359 (75 LEd 1117, 51 SCt 532, 73 ALR 1484) (1931).'" at 526.

Petitioner was denied those protections guaranteed by the Constitution of the United States and the Fourteenth Amendment, in that the trial court instructed the jury that:

> "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts."

Clearly under Sandstrom, such an instruction is blatantly in violation of the United States and Georgia Constitutions.

2. GEORGIA CODE ANN. §38-801 (d), REQUIRING THE TENDER OF ATTENDANCE AND MILEAGE FEES WITH A WITNESS SUBPOENA, DENIED PETITIONER, AN INDIGENT DEATH ROW INMATE IN A STATE HABEAS CORPUS PROCEEDINGS, EQUAL PROTECTION OF THE MEANINGFUL ACCESS TO THE COURT AND COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES HIS BEHALF AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The rights to offer the testimony of witnesses and to compel their attendance if necessary . . . is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967) See also, Webb v. Texas, 409 U.S. 95 (1972). The requirements of §38-801(d) of the Georgia Code Ann. are such that witness and mileage fees are to be tendered with a subpoena if the subpoena is to be

enforceable. Therefore, an indigent is deprived of his right to compulsory process.

Although, due process may not require the Georgia legislature to institute the post-conviction procedure stated in Georgia Code Ann. 850-127; it is clear that once provided, this procedure must be administered so as to provide a full and fair hearing such that it will comport with the principles of Fourteenth Amendment due process and equal protection. Douglas v. California, 372 US 353 (1963).

In the instant case, petitioner, an indigent death row inmate, sought habeas corpus review, in State court, of his conviction and death sentence. Prior to the hearing Petitioner's counsel filed motions requesting funds for investigators expert witnesses, as well as for attendance and mileage fees. See Appendix "E". The above-referenced motions were denied by the habeas corpus court during the hearing. The action of the Georgia habeas corpus court, to-wit: the denial of said Petitioner's motions, deprived Petitioner of meaningful access to the state habeas corpus proceeding. Bounds v. Smith, 430 U.S. 817 (1977).

In Lawrence v. Henderson, 344 F. Supp. 1287 (E.D. La., 1972), the District Court held that the refusal of prison officials to allow inmates served with subpoenas by a Defendant to comply with the subpoenas constituted a violation of the right to compulsory process. The District Court stated:

> "the record is barren as to the reason for the denial of compulsory process. Petitioner may have had it denied him through inadvertance or other innocent reason. The cause of the denial, however, is immaterial. It is the resulting inability to compel (the witness) to testify which is unconstitutional." 344 F. Supp. at 1295.

If Petitioner is to present the merits of his habeas corpus petition in the habeas corpus petition in the habeas proceeding, then it is essential that Petitioner be endowed with the ability to

compel the attendance of witnesses. Without supplementation by testimony from witnesses, the record of Petitioner's trial and his direct appeal are of little value in the post-conviction proceeding.

In order for a Petitioner to substantiate newly discovered and usually complex claims with respect to the unconstitutionality of his conviction and subsequent sentencing, the post-conviction procedure afforded to an indigent petitioner is reduced to a mere legal fiction.

Time and again, this Court has invalidated processes which were found to deny the poor access to the courts, or which made such access ineffectual. Thus, this Court has sought to allow proper access to the courts for all people, whether poor or wealthy. In Burns v. Ohio, 360 U.S. 252 (1959), the Court struck down a scheme which required that individuals pay the filing fees as a prerequisite to prosecuting their appeals. Earlier, in Griffin v. Illinois, 351 U.S. 12 (1956), this Court made it mandatory that an indigent be provided with transcripts necessary to pursue an appeal. While in 1961, in Smith v. Bennett, 365 U.S. 708, the Court struck down a scheme which denied indigents access to the Courts for the purposes of seeking collateral review unless a filing fee could be paid. Clearly, in each of these cases, the impediment to access to the judicial system was cost.

In the instant case, the Georgia law which restricts Petitioner's ability to compel the attendance of witnesses has created an almost impenetrable barrier to Petitioner's assertion of his constitutional claims and rendered the formal access to post-conviction relief, afforded him, completely meaningless.

Petitioner must utilize and complete the Georgia Habeas Corpus procedure before he can petition in a United States District Court for a writ of Habeas Corpus.

The state Habeas Corpus proceeding may finally determine Fourth Amendment constitutional claims, Stone v. Powell, 428 U.S. 465 (1976), and may very well be determinative of and foreclose consideration of other substantial issues in the federal proceeding because "a determination after a hearing on the merits of a factual issue, made by a State Court of compellent jurisdiction . . . shall be presumed to be correct . . ." in the federal proceeding 28 USC §2254 (d).

The deprivation of Petitioner's right to due process and equal protection of law must be given the special scrunity peculiar to cases where death is the penalty. This Court said it best when in Woodson v. North Carolina, 428 U.S. 280, (1976); the Court stated "(d)eath, in its finality; differs more from life imprisonment than a 100 year prison term differs from one of only a year or two." Woodson, supra, at 305.

Georgia Habeas Corpus review must not be administered so as to deprive Petitioner, an indigent under death sentence, of an opportunity to litigate his constitutional claims. Georgia Code Ann. §38-801 (d) deprives Petitioner of meaningful access to the courts is violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

3. FRANKLIN'S DEATH SENTENCE WAS IMPOSED BY A JURY WITHOUT COMPLETE INFORMATION CONCERNING PETITIONER'S LIFE AND CIRCUMSTANCES THUS VIOLATING PETITIONER'S RIGHTS AND UPON IMPROPERLY ADMITTED AGGRAVATING CIRCUMSTANCES THUS VIOLATING PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND FAILING TO COMPORT WITH THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING IN CAPITAL CASES.

The Petitioner's rights were violated under the Eighth and Fourteenth Amendments by the trial judge allowing the introduction of evidence of prior conviction without proper notice. Under Queen v. The State, 131 Ga. App. 370 (1974), the state is required to give proper notice of their intention to introduce prior convictions, before they are allowed to use them at trial. In this case, the proper notice was not given before they used Petitioner's prior convictions at the sentencing stage of trial. (See Appendix "F"), in violation of Petitioner's Eighth and Fourteenth Amendments. (See also, Smith v. Estell, 596 F 2d).

The recent decision by this Court in Eddings v. Oklahoma, No. 80-5727, January 19, 1982:

"(T)he sentencer in capital cases must be permitted to consider any relevant mitigating factor." (Emphasis added).

In 1976, in Jurek v. Texas, 428 US 262, at 271, the court stated:

> "A jury must be allowed to consider on the basis of all relevant evidence not only why a death penalty should be imposed, but also why it should not be imposed."

A jury must consider certain criteria in the sentencing phase of a case involving the death penalty in order to properly impose the death penalty. Among these are, if there are individual circumstances relating to the Defendant, which will require them to find a lesser punishment than the death penalty and if the juror truly understands the punishment he or she is imposing upon the defendant and if this case requires such excessive punishment. This court has rendered many decisions indicating the necessity that a juror properly understand the imminent consequences of imposing the death penalty.

For instance, in Witherspoon v. Illinois, 391 US 510 (1967), the Supreme Court forbade the automatic exclusion of jurors opposing capital punishment. The jury was to be a link to the contemporary community values, and could not reflect those values if part of the

community were arbitrarily excluded from the jury.

Further the court recognized in Gardner v. Florida, 430 US 349, that a death sentence is a different kind of punishment requiring a high standard of reality.

In order for a juror to be properly apprised to make the determination of whether to impose a sentence of death or not, that juror must have available to him all relevant material information as to mitigating circumstances. These mitigating factors encompass many things, including but not limited to the ritual and methodology of the sentence that they impose and society's reaction to execution.

In the instance case, the trial court refused to allow two (2) expert witnesses to testify. (See Appendix "F"). There was an offer of proof that shows these experts would have testified to the rituals and methods of execution and community standards as to the imposition of execution.

Based on prior rulings of this court, it is clear that all mitigating factors must be considered by the jury including the rituals and methods of execution and community standards in order for them to properly imposed the death penalty.

The rituals and methods of execution and the community standards are clearly relevant mitigating factors that the jury must consider in order to properly impose the death penalty. The case of Witherspoon v. Illinois 391 US510 and Jurek v. Texas, 428 US 262 and others along those line show that a Defendant may try to show the jury that capital punishment is contrary to the involving standards of human decency. Defendant believes that the evidence he presents in the penalty phase will show the jurors that there is no rational reason for the imposition of capital punishment in this case or in any other case. Further, the jury may reject a death sentence on any ground they wish, subject only to their discretion. The quality of

mercy they dispense should be based upon "reason rather than caprice or emotion." Gardner v. Florida, 51 LEd 2d at p. 401.

It is very clear that testimony by the two (2) expert witnesses as to rituals and methods of execution and community standards are not only relevant but are essential to a jury's proper determination of whether or not to impose the death penalty. In this case, it was a violation of the Petitioner's rights under the Eighth and Fourteenth Amendments for the trial judge to exclude the testimony of the two (2) experts.

Further, the trial court would not allow a psychologist to testify as to his opinion of the Petitioner's character as to rehabilitation. (See Appendix "F"). As in the case of Eddings v. Oklahoma No. 80-5727, January 19, 1982, the Court in this Case would not allow the psychologist testimony that the Petitioner was treatable. As the Court stated in Lockett v. Ohio 438 US 586 (1978) at 604:

> "(W)e conclude that the Eighth and Fourteenth Amendment require that the sentencing . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death."

Clearly, this case follows the Eddings case in that the trial the Court's failure to allow the psychologist to testify as to the Petitioner's character for rehabilitation was a violation of his Eighth and Fourteenth Amendment.

Wherefore, the death sentence of the Petitioner should be vacated as the sentence was imposed by a jury without complete information and in violation of his Eighth and Fourteenth Amendment.

CONCLUSION

For the reasons show, a writ of certiorari should issue to

review the judgment and opinion of the Superior Court of Butts County.

Respectfully submitted,

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